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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-633

CELANESE CORPORATION AND FIBER INDUSTRIES, INC.,
Petitioners,

v.

THE HONORABLE ROBERT W. HEMPHILL, DISTRICT JUDGE,
Respondent

BRIEF BY THE DUPLAN CORPORATION, ET AL, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Duplan Corporation, et al, submit that the "Question Presented" may be more aptly stated as follows:

QUESTION PRESENTED

Should the extraordinary remedy of mandamus and prohibition issue against a judge of a United States District Court, due to his requirement that a non-party Petitioner submit to the jurisdiction of that Court for assessment of costs before allowing access to documents produced or generated in connection with a litigation pending in that Court, particularly when any error that might result from any assessment could be remedied by appeal?

STATEMENT OF THE CASE

Petitioners, Celanese Corporation and Fiber Industries, Inc., herein referred to jointly as Celanese, are parties in a

number of cases consolidated by the Judicial Panel on Multidistrict Litigation for pretrial and discovery in the United States District Court for the Southern District of Florida as MDL Docket No. 82 (Florida Proceedings). Celanese is not a party to Consolidated Civil Action No. 71-306 pending in the United States District Court for the District of South Carolina (South Carolina Proceedings). The Duplan Corporation, et al, herein referred to jointly and severally as Throwsters, are parties in the latter proceedings; and several but not all of the Throwster parties in the South Carolina Proceedings are likewise parties in the Florida Proceedings.

The vast majority of the discovery proceedings in the South Carolina action, which involves the infringement and validity of some twenty-two patents (none of which are at issue in the Florida Proceedings) and related antitrust issues have been conducted in the presence of The Honorable Robert W. Hemphill, Judge of the United States District Court for the District of South Carolina. Since the inception of the South Carolina Proceedings, slightly less than four years ago, depositions have been taken of over 75 witnesses; and thousands of documents have been produced.

On July 24, 1972, Celanese filed its original petition in the South Carolina Proceedings seeking, *inter alia*, access to all unprivileged documents produced in that proceeding. Celanese was granted a hearing on December 7, 1972. After this hearing Judge Hemphill addressed the following question to all counsel, including counsel for Celanese:

(1) "In the event Celanese is allowed to obtain certain records pertaining to the subject litigation, should Celanese be taxed for part of the costs, including court costs, transcript fees, transcribers' fees, etc.?;" (A. 1a)

In its response to this question Celanese stated:

> ". . . Celanese has always fully expected to be taxed for whatever part of the costs incident the relief requested by its pending petition the court may deem reasonable in the premises." (A. 2a)

Thereupon, Judge Hemphill rendered his Order of January 22, 1973 permitting Celanese access to documents in the hands of counsel in the South Carolina Proceedings provided that Celanese post a surety bond in the penal sum of $50,000.00 conditioned upon its submission to the jurisdiction of the court and the payment of such sum as the court, after hearing, may determine appropriate (Petitioner's Brief, App. 2a).

Rather than appealing from or requesting certification of Judge Hemphill's January 22, 1973 Order, Celanese posted the requisite surety bond. Continuously since January 22, 1973 until the present, the requested documents have been offered to Celanese, initially on a non-selective basis (A. 4a), and more recently on a basis whereby Celanese would be permitted to review the documents and select for copying only those in which it is interested. (A. 7a). This latter offer has been accepted and Celanese began its review of the documents on October 22, 1973. (A. 7a).

Rather than accepting the original proffer by parties to the South Carolina Proceedings of all requested documents on a non-selective basis, Celanese, on February 28, 1973, filed a motion in those proceedings to fix costs. Before a hearing on this motion could be scheduled, Celanese petitioned the Court of Appeals for the Fourth Circuit for a Writ of Mandamus seeking to compel Judge Hemphill to permit free access to the South Carolina documents and to dissolve the surety bond that it had voluntarily posted. The petition was denied by order of the Court of Appeals of the Fourth Circuit

entered July 28, 1973 upon the grounds that the District Court did not abuse its discretion in placing conditions upon Celanese's access to the documents, and that after the District Court determines costs, an appeal would afford Celanese an adequate remedy. (Petitioner's Brief, App. 1a).

ARGUMENT

Even if it is assumed, *arguendo*, that Celanese has been in some manner prejudiced by Judge Hemphill's Order of January 22, 1973, Celanese's petition flies squarely in the face of the firmly established rule that mandamus may not be utilized as a substitute for appeal. Judge Hemphill's Order imposed nothing more than reasonable safeguards upon the accessibility of documents secured after four years of costly litigation. Had Celanese nevertheless been offended by the order, it need not have filed a surety bond conditioned upon its submission to the Court's jurisdiction and payment of costs. Rather, it could have taken an immediate appeal. Alternatively, having filed the bond and accepted the documents Celanese's right to appeal from any future order of the District Court, assessing costs, remains unimpaired. Celanese's petition should thus be dismissed, if for no other reason than that, as noted by the Fourth Circuit Court of Appeals, it has knowingly bypassed all other available remedies and sought to accomplish the same result through the extraordinary Writ of Mandamus (Petitioner's Brief, App. 1a).*

Manifestly Celanese has not been injured and will not be injured by the District Court's action. The relief sought by

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*Although Celanese styles its present brief "Petition for Certiorari . . . ," it is in substance a Petition for Mandamus. It is interesting to note that Celanese has thus violated the provision of Supreme Court Rule 31(3), in that it has not "set forth with particularity why the relief sought is not available in any other court . . ." (A. 8a). Since relief is manifestly available in other courts, by alternative remedies, Celanese obviously cannot comply with the rule. See Petitioner's Brief, App. 1a.

Celanese has been granted, specifically, access to the documents. Contrary to Celanese's contention, in no way should the instant case be construed to present any issue as to the power of a Federal District Court to levy penal fines upon non-parties seeking discovery. The word, "punitive", appears nowhere in Judge Hemphill's Order of January 22, 1973. Moreover, the only instance in which the word, "penal", appears therein is with reference to the *amount* of security required, *i.e.*, the traditioned provision that the bond be "in the penal sum" of Fifty Thousand Dollars. Obviously, the Order of January 22, 1973 does not impose "punitive fines and penalties, including attorneys' fees", nor are same within the contemplation of the Order wherein it is explicitly provided that the court would, after an appropriate hearing, determine any amounts due. As expressed on December 18, 1972 to Judge Hemphill by its counsel (A. 2a), Celanese very well understood that the Order would contain some provision for taxation of reasonable costs; and Celanese's subsequent argument that the provision for a security bond is in fact "penal," is specious.

Citing little more than the existence of the Florida Proceedings, Celanese also contends that Judge Hemphill has violated his duty to assist sister tribunals in the fact-finding process. The mere chronology of events recited in Celanese's Statement of the Case (Petitioner's Brief at 3-14) reveals how Celanese has stood the facts squarely on their head. Where possible, Judge Hemphill has consistently and repeatedly assisted the Florida Proceedings, for example, by removing and modifying protective orders, by granting hearings to Celanese itself, a party in the Florida Proceedings (nevertheless a non-party in the South Carolina Proceedings), and by ordering that documents produced in the South Carolina Proceedings be made available to Celanese.

Finally, Celanese chastises Judge Hemphill's original "blanket," *sua sponte*, protective order. Since that order was modified (on Celanese's motion) long prior to February 28, 1973, the date when Celanese filed its Petition for Mandamus in the Fourth Circuit Court of Appeals, each of Celanese's contentions regarding that order are moot as well as baseless. Even if the initial protective order were at issue, an answer would lie in the proposition, too well established to require citation, that a court may do, *sua sponte*, that which it may do upon motion of a party pursuant to Rule 26 (c) Fed. R. Civ. P.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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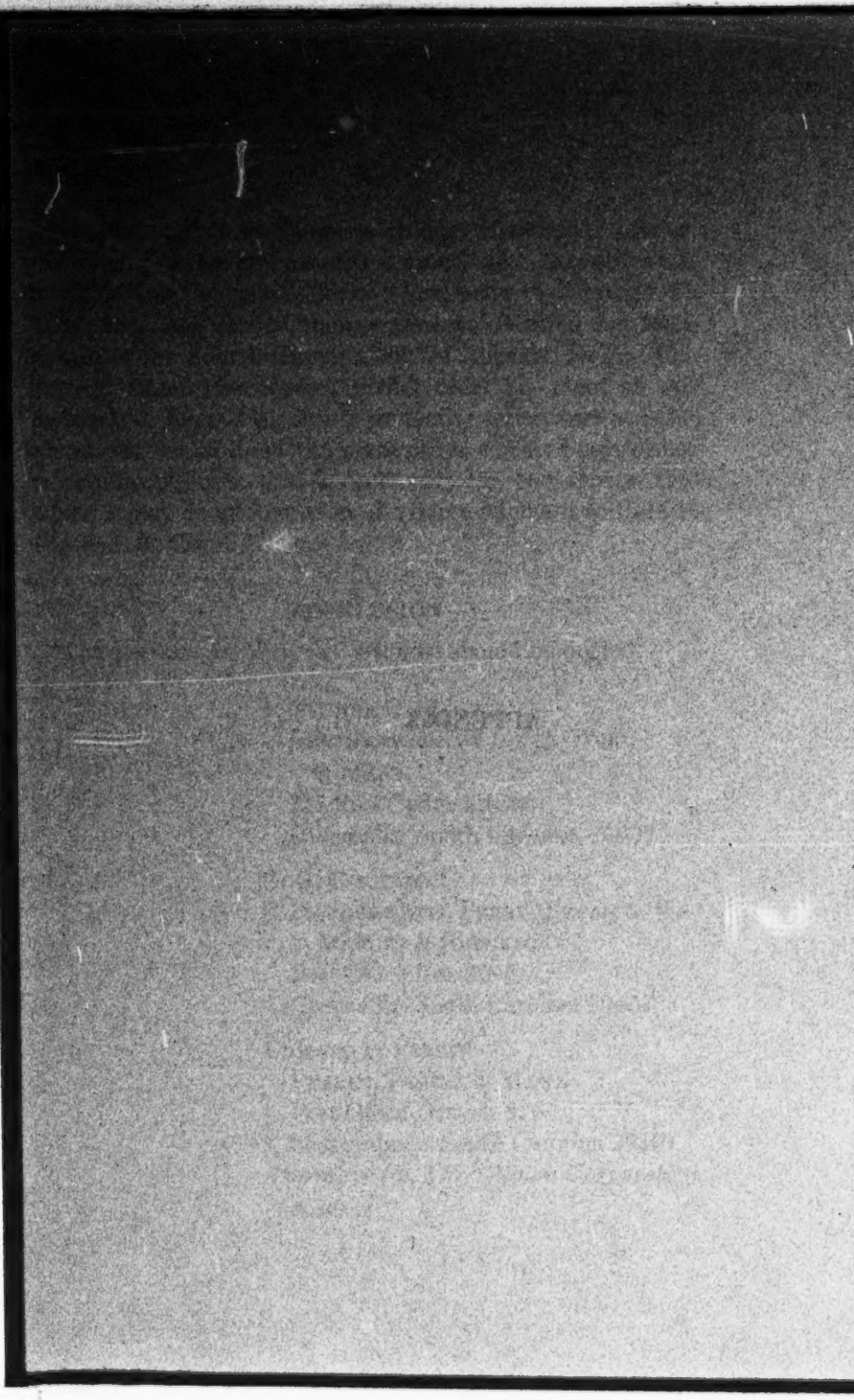
APPENDIX



UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
DISTRICT OF SOUTH CAROLINA
GREENVILLE, S. C. 29603

POST OFFICE BOX 10250
TELEPHONE NUMBER CEDAR 3-2781

PLEASE REFER TO

December 13, 1972

Consolidated C.A. No. 71-306

Thomas A. Evins, Esq.
Jay Greenfield, Esq.
Rufus Ward, Esq.
T. T. Moore, Esq.
Fletcher C. Mann, Esq.
O. G. Calhoun, Esq.
Edward P. Perrin, Esq.
Edward S. Irons, Esq.
J. Buford Grier, Esq.

Gentlemen:

Judge Hemphill would like to be advised on the following question, relevant to the matters discussed before the court on December 7, 1972, at Rock Hill:

(1) In the event Celanese is allowed to obtain certain records pertaining to the subject litigation, should Celanese be taxed for part of the costs, including court costs, transcript fees, transcribers' fees, etc.?;

(2) If Celanese should be taxed for part of the costs, what amount would the parties consider sufficient or just;

(3) What other suggestions do the parties have as to any costs to be assessed against Celanese if the permission sought is granted.

AT THE DIRECTION OF THE COURT

/s/ EDITH D. THOMAS
Deputy Clerk

December 18, 1972

Honorable Robert W. Hemphill
United States District Judge
United States Courthouse
Rock Hill, South Carolina

Re: Consolidated C. A. 71-306

Dear Judge Hemphill:

Responding to Your Honor's inquiry of December 13th, Celanese has always fully expected to be taxed for whatever part of the costs incident the relief requested by its pending petition the Court may deem reasonable in the premises.

I believe it to be a matter of first principle that the records of any federal dstrict court should be available on reasonable terms to any member of the public and particularly to a party requiring such records to fairly *present its case* in related litigation.[1]

1. For example, it appears that Robert Leesona, retired chief executive of Leesona, had been deposed in the subject litigation on matters common to the consolidated Florida action—yet that Leesona deposition is, as of this writing, unavailable to Celanese. The deposition is needed for a further deposition of Mr. Leesona which Celanese seeks leave to take in Florida beginning January 22nd.

I accordingly again emphasize our disagreement with the suggestion expressed by D.M.R.C. and Chavanoz, and perhaps others, that we be excluded from access to materials which may be subject to any protective order outstanding in this case. Rather, as in *Olympic Refining Co. v. Carter*, 332 F. 2nd 260 (9th Cir. 1964), such protective orders, if they

exist, should be "... modified in such form as to permit access to the documents subject to reasonable restrictions as to disclosure ...", 332 F. 2nd 266.

I reiterate my prior suggestion that, in the first instance, any of the requested records that are subject to a protective order be made accessible only to me and to members of this firm for an initial screening to determine which, if any, of such materials we will wish to use affirmatively in the Florida litigation. As to the materials identified through initial screening activities, further appropriate orders will be sought and may be entered after all concerned have had appropriate opportunity to be heard. We do not seek access to records as to which legitimate claims of attorney-client privilege or work product have been sustained.

Respectfully submitted,

Edward S. Irons

ESI:bg

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PATENT AND TRADEMARK PRACTICE

TEL. (704) 377-1961
TELEX 579-102
CABLE: CHARPAT

PLEASE REPLY TO:
P. O. DRAWER 10337

SHIRLEY L. PARROTT
PAUL B. BELL
DONALD H. SELTZER
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FLOYD A. GIBSON
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JULIAN C. CARNES, JR.
DANIEL E. McCONNELL
JOELL T. TURNER
JOHN L. SULLIVAN, JR.
CHARLES B. ELDERKIN
W. THAD ADAMS, III
JOHN J. BARNHARDT, III
RAYMOND O. LINKER, JR.

February 16, 1973

Louis Gubinsky, Esquire
Irons, Sears & Santorelli
13 Beacon Hill Lane
Charlotte, North Carolina 28211

Re: Consolidated DMRC Cases—
District of South Carolina
Civil Action No. 71-306

Dear Louis:

This will confirm our several conversations during the past four days concerning the furnishing to the Celanese Corporation with copies of documents produced to the throwster plaintiffs in the above action, as well as copies of transcripts of all depositions taken in this action by the throwster plaintiffs. I advised you that a document depository containing all of these items is maintained in our office in Charlotte and this firm has been requested by other counsel to assume the responsibility for furnishing you copies of these materials.

I also advised you that we are constantly working with all of these documents and transcripts in preparation for further proceedings in this action, and accordingly, it would be most inconvenient and disruptive to permit someone from your firm to actually come into our office and work in these same files. However, our set-up is such that we could without too much disruption make copies for you on a nonselective basis.

As to the costs involved in furnishing you copies of these documents, I advised you that it would be presumptuous on our part to set any cost on furnishing you copies. Rather, it is our understanding from Judge Hemphill's Order and recent clarification from the bench on February 14 that the Court will set this figure after your requests have been satisfied. Accordingly, it is our intention to keep a record of all expenses and time expended by both professional and clerical personnel in fulfilling your requests and ultimately place such information in the hands of Judge Hemphill for his assessment of the costs to Celanese.

I would like to also confirm for the record that pursuant to your request on February 14, we have furnished you with a copy of the transcript of the deposition of Mr. Robert Leeson.

Finally, I wish to confirm specifically that you have instructed me to furnish no more copies to you without specific authorization. So that there may be no misunderstanding, I respectfully request that all such future authorization of this type be in writing.

Very truly yours,

/s/ CHARLES B. PARK, III

CBP:cw

cc: Honorable Robert W. Hemphill
Miller C. Foster, Jr., Clerk
All Counsel
Edward S. Irons, Esquire

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JOHN J. BARNHARDT, III
RAYMOND O. LINKER, JR.

PATENT AND TRADEMARK PRACTICE

TEL. (704) 377-1961
TELEX 579-109
CABLE: CHARPAT

PLEASE REPLY TO:
P. O. DRAWER 10037

October 19, 1973

Edward S. Irons, Esquire
Irons, Sears & Santorelli
1803 K Street, N.W.
Washington, D. C. 20008

Re: Celanese Corporation and Fiber Industries, Inc. v. The Honorable Robert W. Hemphill, District Judge, Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit Duplan Corporation et al v. Deering Milliken et al Consolidated Cvil Action 71-306—District of South Carolina.
In Re Yarn Processing Patent Litigation — MDL Docket No. 82 — Southern District of Florida

Dear Ed:

This will confirm our recent discussions concerning your efforts to obtain access to certain documents etc. compiled and prepared in Consolidated Civil Action 71-306, which efforts are now the subject of your above-identified Petition to the Supreme Court of the United States, and the subject of a Motion under Rule 37 against some of our clients in the MDL Docket No. 82 Florda litigation.

On page 11 of your Petition for Writ of Certiorari you allude to certain "negotiations" which were held with us in

February of 1973, and you state "These negotiations were wholly unsatisfactory because counsel refused to permit preliminary inspection of the documents but would agree only to furnish copies of records on an 'all or nothing basis.' " As you know, the position taken by us in these "negotiations" is set forth in our letter of February 16, 1973 to Mr. Louis Gubinsky of your firm, a copy of which is attached.

Since February of this year our preparation for trial in the South Carolina action has progressed to the point where it would no longer be significantly disruptive to us to permit you to inspect the documents etc. in question, and obtain copies thereof on a selective basis. Accordingly, we have offered to make available to you at our offices in Charlotte our master numerical set of the documents in question. In response to our offer you have advised that Mr. Spellman of your firm will come to our offices on Monday, October 22 to commence a review of these materials.

Very truly yours,

Charles B. Park, III

CBP:cw

Enclosure

cc: Honorable Robert W. Hemphill
Honorable C. Clyde Atkins
Miller C. Foster, Clerk—District of South Carolina
Joseph I. Bogart, Clerk—Southern District of Florida
William K. Slate, II, Clerk—
Fourth Circuit Court of Appeals
All Counsel — Consolidated Civil Action No. 71-306
All Counsel — MDL Docket No. 82

RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 31(3)

"If the petition seeks issuance of a writ of prohibition, a writ of mandamus, or both in the alternative, it shall set forth with particularity why the relief sought is not available in any other court, and there shall be appended to such petition a copy of the judgment or order in respect of which the writ is sought, including a copy of any opinion rendered in that connection, and such other papers as may be essential to an understanding of the petition. The petition shall follow, insofar as applicable, the form for the petition for writ of certiorari prescribed by Rule 23. The motion and petition shall be served on the judge or judges to whom the writ is sought to be directed, and shall also be served on every other party to the proceeding in respect of which relief is desired. The judge or judges, and the other parties, may, within thirty days after receipt of the motion and petition, file forty printed copies of a brief or briefs in opposition thereto, with proof of service. If the judge or judges concerned do not desire to contest the motion and petition, they may so advise the clerk and all parties by letter. All parties, other than the judge or judges, who are served pursuant to this paragraph, shall also be deemed to be respondents for all purposes in the proceeding in this court."